IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1931 of 2005
With
SPECIAL CIVIL APPLICATION No. 12749 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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SNEHANJALI COOPERATIVE HOUSINGSOCIETY LTD.,THRO' ITS CHAIRMA - Petitioner(s)
Versus
THE STATE OF GUJARAT & 10 - Respondent(s)

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Appearance :
MR MAHESH BHAVSAR for the Petitioner
MR DA DESAI, ASST. GOVERNMENT PLEADER for Respondent Nos.1 and 2
MR KB TRIVEDI, learned senior advocate with MR PR NANAVATI, learned advocate for Respondent Nos.3 and 4
MR AJ PATEL learned advocate for Respondent No.5
MR VIKRAM J THAKOR for Respondent Nos.6 to 11.

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH
Date : 20/10/2005

ORAL COMMON JUDGMENT

1. By way of Special Civil Application No.1931 of 2005 under Article 226 of the Constitution of India, the petitioner Snehanjali Cooperative Housing Society Limited (hereinafter referred to as “the Snehanjali society) has prayed for an appropriate writ, direction and/or order for quashing and setting aside the Town Planning Scheme, Thaltej No.1 (final) in so far as it relates to original survey No.113/2. A further prayer is also made to quash and set aside the variation made in the Town Planning Scheme, Thaltej No.1 (final) vide notification dated 23-4-2001 in exercise of powers under Section 70 of the Gujarat Town Planning and Urban Development Act and Rules 1976 (for short “the Act and Rules”) by which the scheme was varied with regard to original survey Nos.113/2 and 113/1 and final plot Nos. 68 and 67 respectively on account

of an error. It is also further prayed for an appropriate writ, direction and/or order directing the Ahmedabad Urban Development Authority (AUDA) not to disturb the possession of the petitioner from survey No.113/2 i.e. F.P. No.65, which forms the part of the Town Planning Scheme, Thaltej No.1 (final). It is also further prayed for an appropriate order directing the AUDA not to permit the development on F.P. No.68 of the said Town Planning Scheme and not to grant development permission. By way of interim relief, it is prayed to direct the AUDA not to disturb the possession of the petitioner of survey No.113/2 i.e. F.P. No.65 forming part of the Town Planning Scheme, Thaltej No.1 (final) and not to permit development on F.P. No.68 of the said scheme.

2. So far as Special Civil Application No.12749 of 2003 is concerned, the petitioner Nidhi Cooperative Housing Society Limited (hereinafter

referred to as “the Nidhi society) has prayed for an appropriate writ, direction and/or order directing the AUDA, appropriate authority under the Act to hand over the vacant and peaceful possession of the land admeasuring 4645 sq mtr of F.P. No.65 of the Town Planning Scheme, Thaltej No.1 (final) by removing unauthorized construction put up by the Snehanjali society (petitioner of Special Civil Application No.1931 of 2005). Initially, alternatively, it was prayed for an appropriate order directing the AUDA to hand over the vacant and peaceful possession of the land bearing F.P. No.68 admeasuring 4299 sq mtr, which is allotted to Snehanjali society in lieu of their original survey No.113/2 on which the Snehanjali society has put up unauthorized construction. However, at the time of hearing of these Special Civil Applications, it was submitted by the learned counsel appearing on behalf of the Nidhi society that the petitioner does not press the alternative prayer made in

para 34-A of the petition relating to direction upon AUDA to hand over the vacant and peaceful possession of the land bearing F.P. No.68 admeasuring 4299 sq mtr, which is alleged to be alloted to respondent No.2 society i.e. Snehanjali society in lieu of the said land of the petitioner society on which Snehanjali society has put up unauthorized construction and it was requested to permit the petitioner to delete the said prayer and the said permission was accordingly granted by order dated 20-1-2005. Thus, only part of para 34-A of the petition is required to be considered.

3. As common question of law and facts arise in both these petitions and they are interconnected and with regard to one common land bearing F.P. No.65, both these petitions are being disposed of by this common judgment and order.

4. The question, which has been raised in

present Special Civil Application No.1931 of 2005 is that should the construction put up by the petitioner put up illegally and unauthorizedly on the land allotted to others be protected? Another question which is to be considered by this court is whether, should AUDA, an appropriate authority under the provisions of the Act be directed to hand over the peaceful and vacant possession of the land which is alloted to the petitioner of Special Civil Application No.12749 of 2003 under the finalized Town Planning Scheme after removing unauthorized and illegal construction put up by the Snehanjali society (petitioner of Special Civil Application No.1931 of 2005)?

5. Few facts are necessary for the purpose of determination of both these Special Civil Applications. Original survey No.113/2 situated at Thaltej town admeasuring 6070 sq mtr of land, was owned by Dahyaji Motiji and others. Survey No. 113/1 admeasuring 12141 sq mtr was owned by

Smt. Minaben Mahasukhlal and others. It appears that Dahyaji Motiji and others were the owners of land bearing survey No.113/2 and Smt. Minaben Mahasukhlal and others were the owners of land bearing survey No.113/1. However, there was a mistake in the revenue records with regard to said lands prior to 1983 and in the revenue record, Dahyaji Motiji and others were shown as owners of land bearing Survey No. 113/1 and similarly Smt. Minaben Mahasukhlal and others were shown as owners of land bearing Survey No. 113/2 in the year 1983. In the year 1983 itself, the Revenue records of survey Nos.113/1 and 113/2 were corrected and vide mutation Entry No. 2778, necessary *durasti* (correction) was carried out and Dahyaji Motiji and others were shown as owners of land bearing Survey No. 113/2 and Smt. Minaben Mahasukhlal and others were shown as owners of land bearing Survey No. 113/1. One Rameshbhai Naranbhai and Smt. Manekben were the owners of lands bearing Revenue Survey No. 83,

109, 110/1 and 110/2. Intention for Town Planning Scheme, Thaltej No.1 was declared covering the aforesaid lands on 28-12-1976 and the Draft Scheme came to be sanctioned by the State Government on 7-9-1978. Under the Draft Town Planning Scheme, the ownership and survey number shown as per the Record of Rights of 1983 came to be considered and therefore, at the relevant time, Dahyaji Motiji and others were considered as owners of land bearing Survey No. 113/1 and Smt. Minaben Mahasukhlal and others were considered as owners of land bearing Survey No. 113/2 and the said mistake continued. Under the sanctioned Draft Town Planning Scheme as well as Preliminary Scheme, Revenue Survey No. 113/1, admeasuring area of 6070 sq mtr was given O.P. No. 33/1 and in lieu of the same, the original land owners are alloted F.P. No.67 admeasuring 4299 sq mtr. Similarly, Survey No. 113/2, admeasuring 12141 sq mtr was given O.P. No. 33/2 and in lieu of the same, the original owners were

alloted F.P. No.68 admeasuring 8862 sq mtr. At the relevant time, when the draft scheme was sanctioned in the year 1978 and even in the preliminary Town Planning Scheme and finalized Town Planning Scheme, owners of land bearing survey No.83, 109, 110/1 and 110/2 are alloted F.P. No.34 (6704 sq mtr), F.P. No.57 (6010 sq mtr) and F.P. No.65 (20,434 sq mtr). It appears that F.P. No.65 is comprising of the land bearing survey No.113/2 also, meaning thereby, original land bearing survey No.113/2 is forming part of F.P. No.65. It appears that the petitioner of Special Civil Application No.12749 of 2003 were handed over actual and peaceful possession of F.P. Nos.34 and 57. However, only 15,789 sq mtr of F.P. No.65 was handed over to them, as with respect to remaining land, which was from the land bearing survey No.113/2, there was illegal and unauthorized construction put up by the Snehanjali society (petitioner of Special Civil Application No.1931 of 2005). It is the case of

the petitioner of Special Civil Application No.12749 of 2003 that in spite of the Town Planning Scheme has become final and they are allotted F.P. No.65 in the very original survey No., they are not handed over peaceful and vacant possession of entire F.P. No.65 and in spite of the repeated request and application, nothing further has been done in view of the various litigations by the Snehanjali society and therefore, they have preferred present Special Civil Application No.12749 of 2003 for an appropriate order directing the AUDA to hand over the peaceful and vacant possession of entire F.P. No.65 (remaining land from land bearing survey No.113/2, illegally occupied by the Snehanjali society) and to implement the finalized Town Planning Scheme.

6. It appears from the record that as stated above, initially prior to 1983, there was a mistake in the revenue records with regard to

land bearing survey Nos.113/1 and 113/2 and Dahyaji Motiji and others were shown as owners of land bearing survey No.113/1 instead of survey No.113/2 and Smt. Minaben Mahasukhlal and others were by mistake shown as the owners of the land bearing survey No.113/2 instead of 113/1 and therefore, with a view to correct the said error, an application was submitted by the power of attorney holder of the original land owners of land bearing survey No.113/2 for correcting the mistake in survey numbers on the basis of revenue records and an application was submitted for variation of the scheme to that effect by correcting the error in exercise of powers under Section 70 of the Act and as a result of the said application, the survey numbers are corrected by notification issued by the State Government dated 23-4-2001 and in lieu of survey No.113/1 admeasuring 12141 sq mtr, O.P. No.33/2, they are allotted F.P. No.67 admeasuring 8862 sq mtr and consequently in lieu of survey No.113/2

admeasuring 6070 sq mtr of land , O.P. No.33/1, F.P. No.68 admeasuring 4419 sq mtr of land. Thus, by the aforesaid variation only survey numbers are changed and an error came to be corrected. That the petitioner Snehanjali society has also challenged the aforesaid variation vide notification dated 23-4-2001 and has prayed for to quash and set aside the said variation vide notification dated 23-4-2001.

7. Shri Bhavsar, learned advocate appearing on behalf of the petitioner Snehanjali society has submitted that with respect to land bearing original survey No.113/2, the Snehanjali society has filed Regular Civil Suit No.139 of 1990 before the learned Civil Judge (SD), Ahmedabad Rural and below Exh-5, the trial Court had granted the interim injunction restraining the AUDA from demolishing the construction existing on the land bearing survey No.113/2 and during the pendency of the said suit, the Town Planning

Scheme has become final and therefore, the Town Planning Scheme, Thaltej No.1 is bad in law and is a nullity as the Civil Suit No.139 of 1990 is pending before the civil Court and the injunction granted by the civil Court is in operation. It is also further submitted that before finalization of the Town Planning Scheme, the petitioner Snehanjali society, the bona fide purchaser of survey No.113/2 were to be given sufficient opportunity of stating their views but without hearing the said society and without considering the representation of the said society, the Town Planning Officer, State Government finalized the Town Planning Scheme and therefore, the scheme is required to be quashed and set aside as the same is against the principle of natural justice. It is also further submitted that no individual notice has been served upon the petitioner society i.e. Snehanjali society before finalizing the Town Planning Scheme as required under Section 52 read with Rule 26 of the Act and the

Rules and therefore, also the Town Planning Scheme, Thaltej No.1, which has become final, requires to be set aside as the same is null and void. It is also further submitted that the procedure as required to be followed under Section 56 with regard to disputed ownership, has not been followed and therefore, also the scheme is required to be quashed and aside.

8. Shri Bhavsar, learned advocate appearing on behalf of the petitioner – Snehanjali society has relied upon the judgment of the Hon'ble Supreme Court in the case of **Jaswantsingh Mathurasingh and another V. Ahmedabad Municipal Corporation and others** reported in 1992 Supp (1) SCC 5 in support of his submission and submitted that as the petitioner was not served with a special notice before finalization of the Town Planning Scheme and therefore, non-compliance with the requirements would vitiate the final scheme. Shri Bhavsar has also relied upon one another decision

of the Hon'ble Supreme Court in the case of **Mansukhlal Jadavji Darji and another etc. V. Ahmedabad Municipal Corporation and others** reported in AIR 1992 SC 752 in support of his above submission. Shri Bhavsar has also relied upon the judgment of the Division Bench of this Court in the case of Kaushikprasad Chandulal Mahadevia and anr V. the Ahmedabad Municipal Corporation and others reported in 11 GLR 993 in support of his above submission and submitted that the Town Planning Officer is bound to give sufficient opportunity of hearing to the petitioner to express his view.

9. It is further submitted that the Snehanjali society had purchased the land of land bearing survey No.113/2 by registered sale deeds with plinth level construction and therefore, the society had constructed the flats and row houses. It is submitted that the Snehanjali society is in possession of the disputed land since last more

than 18 years.

10. It is further submitted that so far as variation is concerned, proposed variation was not published in any Gujarati newspaper circulating within the jurisdiction of the appropriate authority and thus the town planning authority has not followed the mandatory requirement of the Act and the Rules of 1976. It is further submitted that earlier as per the final Town Planning Scheme, Thaltej No.1, F.P. No.67 was carved out from survey No.113/2 and F.P. No.67 was alloted to one Smt. Minaben Mahasukhlal and others in lieu of survey No.113/2 and as per the Form No.F, re-distribution and valuation statement, earlier F.P. No. 68 was carved out from survey No.113/1 and F.P. No.68 was allotted to original landlord Dahyaji Motiji and others and thereafter, the variation was made and survey No.113/1 was replaced by survey No.113/2 and survey No.113/2 was replaced by

survey No.113/1 in the form F and thus, the said variation has affected directly to the ownership rights of the petitioner qua original survey No.113/2. However, without publishing the proposed variation in any Gujarati newspaper, the scheme is varied vide aforesaid notification dated 23-4-2001 and thus, the variation is also required to be quashed and set aside. It is further submitted that the procedure, as required to be followed under Section of the Act read with Rule 35, has also not been followed.

11. It is submitted that the Snehanjali society purchased original survey No.113/2 by nine different registered sale deeds prior to finalization of the Town Planning Scheme and there are residential houses/row houses on the land bearing survey No.113/2 since many years and therefore, it is requested to grant the relief as prayed for.

12. Special Civil Application No.1931 of 2005 filed by the Snehanjali society is opposed by AUDA, original owner of land bearing survey No.113/2 and owner of F.P. No.65 i.e. Nidhi society, who are alloted land bearing survey No.113/2 by way of forming part of the F.P. No.65 under the finalized Town Planning Scheme. Shri KB Trivedi, learned senior advocate appeared with Shri PR Nanavati, learned advocate appearing for AUDA, Shri Vikram Thakore learned advocate appeared on behalf of respondent Nos.6 to 11, original land owner of land bearing survey No.113/2 and Shri AJ Patel, learned senior advocate appeared on behalf of respondent No.5 – Nidhi society.

13. Shri KB Trivedi, learned senior advocate appearing on behalf of AUDA, appropriate authority under the Town Planning Scheme, has submitted that the intention of the Town Planning Scheme, Thaltej No.1 was declared on 28-12-1976.

Draft scheme came to be sanctioned on 7-9-1978 after following due procedure as required under the provisions of the Act. Under the draft Town Planning Scheme, the ownership and survey numbers shown as per the record of rights of 1983 came to be considered, however there was a mistake in the record of rights qua the survey numbers. Though Dahyaji Motiji and others were the owners of land bearing survey No.113/2, by mistake Smt. Minaben Mahasukhlal and others were considered as owners of the land bearing survey No. 113/2 and the said mistake continued. It is submitted that under the draft Town Planning Scheme as well as the preliminary scheme, revenue survey No. 113/1 was given O.P. No.33/1 and in lieu of the same, F.P.No.68 was alloted. Similarly, in lieu of the survey No.113/2, O.P. No.33/2, and in lieu of the same, F.P.No.67 was alloted. It is further submitted that under the draft scheme, which came to be sanctioned on 7-9-1978, original survey No.113/2 was forming part of F.P.No. 65 which is

allotted to owners of land bearing survey Nos. 110/1 and 110/2 i.e. Rameshbhai Naranbhai and others (i.e. erstwhile owners of Nidhi society) and therefore, when the land bearing survey No. 113/2 was allotted to Rameshbhai Naranbhai and others, forming part of F.P.No. 65, neither the Snehanjali society nor the original owners of land bearing survey No. 113/2 could have put up any construction, as survey No.113/2, forming part of F.P.No. 65 was belonging to Rameshbhai Naranbhai and others. That position also came to be continued even on finalization of preliminary scheme as well as finalization of Town Planning Scheme. It is further submitted that the preliminary Town Planning Scheme came to be sanctioned on 13-8-1986 and the same further came to be finalized in the year 1993. It is submitted that in spite of the fact that original survey No.113/2, forming part of F.P.No. 65 was allotted to the owners of land bearing survey Nos. 110/1 and 110/2 i.e. Rameshbhai Naranbhai and others,

initially, original owners of land bearing survey No. 113/2 and thereafter, the Snehanjali society continued to put up illegal and unauthorized construction and therefore the members, organizers and office bearers of the Snehanjali society were served with the notice dated 6-7-1989 by the AUDA pointing out that they have continued to put up the construction illegally and unauthorizedly and they should stop putting up further construction and if the plans are sanctioned to produce the same. It is further submitted that in spite of the said notice dated 6-7-1989, the Snehanjali society continued to put up illegal construction on the land bearing survey No. 113/2, which was forming part of F.P.No. 65 and therefore, AUDA again served show cause notice dated 6-2-1990 by which the AUDA called upon the occupiers, officer bearers and organizer of the Snehanjali society to remove the illegal construction and thereafter the Snehanjali society filed Regular Civil Suit

No.139 of 1990 against the AUDA only for permanent injunction restraining the AUDA from demolishing the construction put up on land bearing survey No. 113/2 by contending inter alia that they are the owners of land bearing survey No. 113/2 and the learned trial Court granted temporary injunction below Exh-5 restraining the AUDA from removing any construction from the land bearing survey No. 113/2. It is submitted that in fact prior thereto, the draft scheme was already sanctioned in 1979 and even the preliminary Town Planning Scheme was also sanctioned on 13-8-1986. It is submitted that under the Town Planning Act, once the preliminary scheme is sanctioned, usually nothing further is required to be done except provisions for finance etc. and on sanctioning the preliminary scheme, it is virtually finalizing the Town Planning Scheme and as the interim injunction was in 1990 and prior thereto draft Town Planning Scheme as well as preliminary Town Planning Scheme were sanctioned,

it cannot be said that the Town Planning Scheme, Thaltej No.1 which has become final, is in any way illegal and/or even contrary to the ad interim injunction. It is further submitted that even there was no injunction granted by the learned trial Court not to finalize the Town Planning Scheme.

14. It is further submitted that so far as the variation of the scheme vide notification dated 23-4-2001 is concerned, the scheme is varied after following due procedure as required. It is submitted that the scheme was defective on account of an error qua survey Nos. 113/1 and 113/2 only and there was a mistake in description of the survey numbers and respective owners and therefore, an application was submitted by the power of attorney holder of original owners of original survey No.113/2 to vary the scheme and correct the error/mistake and therefore, it was proposed to the State Government for variation of

the scheme and it was requested to correct the error by variation of the scheme and the Government of Gujarat considered the said scheme to be defective on account of an error and was satisfied that the variation required in the said scheme, is not substantive and thereafter the draft variation was duly published in the Government notification and after satisfying that the necessary action for getting and affixing the copies of the Government notification dated 2-6-2000 has been duly taken by the AUDA and as there were no objections to the draft variation received by the State Government and after consulting the AUDA, the Chief Town Planning Officer to the State Government and the Collector, Ahmedabad in the matter, the Government sanctioned the variation in the Town Planning Scheme, Thaltej No.1 (final) in exercise of powers conferred by sub section 6(b) of Section 70 of the Act and the same is in accordance with law and the provisions contained

in the Act. It is also further submitted that so far as the variation is concerned, it is with regard to survey No.113/1 and 113/2 only and there is no variation with regard to allotment of F.P.No. 67 and 68 and even it has nothing to do with F.P.No. 65 (original survey No.113/2) upon which the Snehanjali society has put up the illegal and unauthorized construction and which is required to be removed/demolished. Therefore, it is submitted that by variation, the rights of the petitioner Snehanjali society qua the land bearing survey No. 113/2 and respective final plots has not been affected and Dahyaji Motiji & Others, original owners of land bearing original survey No.113/2 continue to be allotted F.P. No.68.

15. It is further submitted by Shri Trivedi that the Snehanjali society has continued to put up illegal and unauthorized construction on the land bearing survey No. 113/2, though it was forming

part of F.P.No. 65, which was allotted to the owners of land bearing survey Nos. 110/1 and 110/2 and for which notices were issued in the year 1989 to stop illegal and unauthorized construction upon the land bearing F.P.No. 65 (land bearing survey No. 113/2) and the society was called upon to produce the plans sanctioned and still the petitioner – Snehanjali society neither produced the sanctioned plan nor stopped the construction on the land bearing survey No. 113/2 (forming part of F.P.No. 65) and therefore, the notices were issued in 1990 i.e. 6-2-1990 directing the occupiers, members, office bearers and organizers of the Snehanjali society to remove the unauthorized construction on the land bearing survey No. 113/2 (F.P.No. 65) and immediately the petitioner approached the learned trial Court by way of Regular Civil Suit No.139 of 1990 and obtained injunction. It is submitted that as the construction put up by the Snehanjali society on the land bearing survey No. 113/2

(F.P.No. 65) is absolutely unauthorized and illegal and the land belonging to other persons, the prayer of the petitioner to protect the said construction cannot be granted and therefore, it is requested to dismiss the present Special Civil Application with cost.

16. So far as Special Civil Application No.12749 of 2003 is concerned, it is submitted by Shri Trivedi that in view of the litigation by the Snehanjali society by way of various proceedings, the Nidhi society could not be handed over peaceful and vacant possession of entire F.P.No. 65, as there is a construction on that portion of the land of original survey No.113/2, illegally occupied by the Snehanjali society. It is further submitted that in view of the injunction granted by the learned trial Court not to remove the construction from the land bearing survey No. 113/2, the possession could not be handed over to the Nidhi society.

17. Shri Vikram Thakore, learned advocate appearing on behalf of the original land owner of land bearing survey No. 113/2 i.e. respondent Nos.6 to 11 of Special Civil Application No.1931 of 2005, has even disputed the title of Snehanjali society with regard to original land bearing survey No. 113/2. It is submitted that the civil suit is already pending between the parties with regard to title of the land bearing survey No.113/2. It is submitted that in fact F.P.No. 68 which is allotted in lieu of original survey No.113/2, should be handed over to them as they were the owners of the land bearing survey No. 113/2.

18. Shri AJ Patel, learned advocate appearing on behalf of the Nidhi society – petitioner of Special Civil Application No.12749 of 2003 has submitted that under the finalized Town Planning Scheme, they are alloted F.P.No. 65 and part of

F.P.No. 65 is consisting of original land bearing survey No. 113/2. It is submitted that once the Town Planning Scheme has become final, it is the bounden duty of the appropriate authority to implement the Town Planning Scheme which has become final and to hand over the peaceful and vacant possession of the final plot, which is allotted to them under the finalized Town Planning Scheme. It is submitted that though under the draft Town Planning Scheme which came to be sanctioned in 1978, the land bearing survey No. 113/2 was forming part of F.P.No. 65, which was allotted to Rameshbhai Naranbhai and others in lieu of survey Nos.110/1 and 110/2, the original owners of land bearing survey No. 113/2 initially and thereafter, the Snehanjali society continued to put up illegal and unauthorized construction on the land bearing survey No. 113/2 (forming part F.P.No. 65) and that too without getting any plan sanctioned and therefore, the construction on the land bearing survey No. 113/2

being illegal and unauthorized and on the land belonging to Nidhi society, the same may not be protected and for the purpose of implementation of the Town Planning Scheme, if the said construction is required to be demolished/removed then the same may be done as it is the society, who has put up the illegal construction, knowing fully well that original survey No.113/2 is allotted to Rameshbhai Naranbhai and others forming part of F.P.No. 65 and knowing fully well if the construction is put up illegally and unauthorizedly then they have to thank themselves and therefore, it is requested to dismiss Special Civil Application No.1931 of 2005 and to allow Special Civil Application No.12749 of 2003 with cost.

Shri Patel, learned advocate appearing on behalf of the Nidhi society has relied upon the judgment of the Hon'ble Supreme Court in the case of **The Municipal Corporation for Greater Bombay and another V. The Advance Builders (India) Pvt.**

Ltd. and others reported in AIR 1972 SC 793 in support of his submission and submitted that once the Town Planning Scheme has become final, it is the bounden duty of the appropriate authority to implement the Town Planning Scheme, which has become final.

19. Heard the learned advocates appearing on behalf of the parties.

20. Petitioner of Special Civil Application No.1931 of 2005 Snehanjali society claims to have purchased land bearing original Survey No. 113/2 situated at Thaltej from original-landowners, i.e., power of attorney holder of Dahyaji Motiji and others and they have put up the construction of residential houses/row houses. It is the contention on behalf of the Snehanjali society that initially, they have entered into an agreement to sale in the year 1983-84 and thereafter they have purchased the same by 9

registered sale deeds and they have purchased the land along with construction upto plinth level which was put up by the original land owners. The contention on behalf of the petitioner Snehanjali society is that they were the owners of land bearing survey No. 113/2 and they are the bona fide purchaser and they have put up the construction of residential houses and therefore, the same should be protected and/or the same should not be removed/ demolished. It is required to be noted that intention to make Town Planning Scheme, Thaltej No.1 was declared by the appropriate authority as required under Section 41 of the Act on 28-12-1976. It is required to be noted that under the provisions of the Act, ownership of survey numbers are required to be considered as per the record either prevailing at the time of declaring intention or at least at the time of preparation of draft scheme. Under the draft Town Planning Scheme, survey No.113/2 was allotted to the owners of the land bearing

survey Nos. 110/1 and 110/2 as part of the F.P.No.65 and the said draft scheme came to be sanctioned on 7-9-78. It is required to be noted that as per Section 41 of the Act, on or after the date on which at draft scheme is published under Section 41, no person shall within the area included in the scheme, carry out any development unless such person has applied for and obtained necessary permission for doing so from the appropriate authority in prescribed form and on payment of such scrutiny fee, as may be permitted by the Regulation. Thus, on declaration of intention to make a scheme and publishing it in the prescribed manner along with a plan showing the area which it proposes to include in the Town Planning Scheme to the State Government, no person, within the area including the scheme can carry out any development/put up any construction unless the necessary permission is obtained. In the present case, the draft Town Planning Scheme came to be sanctioned on 7-9-78 and as stated

above under the draft Town Planning Scheme, land bearing survey No. 113/2 was forming part of F.P.No. 65 and was proposed to be allotted to the owners of land bearing survey Nos. 110/1 and 110/2. Thus, apart from the fact that on declaration of intention under Section 41 of the Act on 28-12-1976, even the original land owners of survey No.113/2 could not have put up any construction, even after the draft scheme when the land bearing survey No. 113/2 was proposed to be allotted to the owners of land bearing survey No. 110/1 and 110/2, the land bearing survey No. 113/2 did not belong to the owners and they proposed to belong to the owners of the land bearing survey No. 110/1 and 110/2, forming part of F.P.No. 65. Therefore, neither the original owners of land bearing survey No. 113/2 nor the Snehanjali society could have put up any construction and/or carried out any development on the land bearing survey No. 113/2. As stated above, after 1978 the owners of land bearing

survey No. 113/2 were not the owners of the land bearing survey No. 113/2, as it was proposed to be forming part of the F.P.No. 65 which is alloted to some other persons. Nothing is on record to suggest that even any permission was sought either by the original land owners or by the Snehanjali society for putting up the construction and/or carrying out any development on the land bearing survey No. 113/2. It is the case of the Snehanjali society that they have purchased the land bearing survey No. 113/2 from the power of attorney holder of the original land owners initially by agreement to sale in the year 1983 and thereafter by registered sale deed. It is required to be noted that under the finalized draft development scheme, the original survey No.113/2 was forming part of F.P.No. 65, which was proposed to be allotted to the owners of the land bearing survey No. 110/1 and 110/2 i.e. Rameshbhai Naranbhai and others. Therefore, either the original land owners and/or their

power of attorney holder could not have even sold the land bearing survey No. 113/2 to the Snehanjali society, as they were not the owners of the land bearing survey No. 113/2. It is also required to be noted that even the original owners of the land bearing survey No. 113/2 submitted the plans in the year 1984 for putting up the construction on the F.P.No. 68 which was allotted in lieu of original survey No.113/2 (by mistake survey No. 113/1). In spite of the aforesaid facts, though the land bearing survey No. 113/2 was allotted to the owners of the land bearing survey No. 110/1 and 110/2 as forming part of F.P.No. 65, the Snehanjali society continued to put up illegal and unauthorized construction and that too without any development permission and/or getting the plan sanctioned and that too on the land belonging to other persons i.e. belonging to the owners of land bearing survey Nos. 110/1 and 110/2. By notice dated 6-7-89, the members, organizers and office bearers of

the Snehanjali society were served with the notice by the AUDA and they were directed to stop the illegal and unauthorized construction on the land bearing survey No. 113/2, forming part of the F.P.No. 65 and were directed to produce the permission if any and/or sanctioning of the plan. In spite of the above, the Snehanjali society continued to put up illegal and unauthorized construction on the land bearing survey No. 113/2 which was forming part of F.P.No. 65 and which was allotted to other persons and therefore, the AUDA served a notice upon the members, office bearers and organizers of the society to stop the illegal construction on the land bearing F.P.No. 65 immediately and also to remove the illegal construction put up on the land bearing F.P.No. 65 within 10 days and on serving the said notice, the Snehanjali society filed Regular Civil Suit No.139 of 1990 before the learned Civil Judge (SD), Ahmedabad Rural for permanent injunction only restraining the AUDA from demolishing and/or

removing the construction on the land bearing survey No. 113/2 (F.P.No. 65) and obtained interim injunction restraining the AUDA from removing and/or demolishing the construction. Nothing is on record that even the construction put up by the Snehanjali society which is on the land bearing original survey No.113/2 (forming part of F.P.No. 65) is after obtaining necessary development permission and/or sanctioning the plan. Therefore, even the construction which has been put up by the Snehanjali society on the land bearing original survey No. 113/2 forming part of F.P.No. 65 is absolutely illegal and without obtaining any development permission and getting the plan sanctioned and therefore, also the same cannot be protected. If the petitioner Snehanjali society had submitted an application for development permission and/or applied for sanctioning of the plan for putting up the construction on the land bearing original survey No.113/2, the same would not have been granted by

the authority, as original survey No.113/2 was proposed to be allotted under the finalized development scheme to the owners of land bearing survey Nos. 110/1 and 110/2, forming part of F.P.No. 65 and naturally the development permission would not have been granted by the AUDA for putting up construction on the land of other persons. From the correspondence, it appears that the office bearers and members of the Snehanjali society were aware of the fact that the original survey No.113/2 is allotted to the owners of land bearing survey Nos. 110/1 and 110/2, forming part of F.P.No. 65 and in fact there was a request made by them also to change the same subsequently i.e. after the preliminary scheme came to be sanctioned. Therefore, if knowing fully well that the construction is being put up unauthorizedly and illegally on the land belonging to other persons and now for the purpose of implementation of the Town Planning Scheme which has become final for handing over

peaceful and vacant possession of F.P.No. 65 to the owners of land bearing survey No. 110/1 and 110/2, if the construction on the land bearing survey No. 113/2 which is illegal and unlawful, is required to be demolished and/or removed, the consequences must follow. As stated above, first of all, the power of attorney holder of the original land owners of land bearing survey No. 113/2 could not have sold the land bearing survey No. 113/2 to the Snehanjali society in the year 1983-84 and/or subsequently, as original survey No.113/2 was allotted to the owners of the land bearing survey Nos. 110/1 and 110/2 under the finalized draft development scheme being part of F.P.No. 65 in spite of aforesaid, as stated above, the Snehanjali society continued to put up construction unauthorizedly and illegally in spite of the AUDA an appropriate authority restraining the society from putting up any further construction. AS held by the Hon'ble Supreme Court in the case of **M.I. Builders Pvt.**

Ltd. V. Radhey Shyam Sahu and others reported in 1999(6) SCC 464 that no consideration should be shown to the builder or any other person where construction is unauthorized and the said dicta is now almost bordering rule of law. It is further held by the Hon'ble Supreme Court that judicial discretion in moulding the relief, cannot be exercised, which encourages illegality or perpetuates an illegality. Unauthorized construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters and justice is to be rendered in accordance with law. Considering the above observation of the Hon'ble Supreme Court, the prayer of the petitioner to restrain the respondents, more particularly, AUDA from removing and/or demolishing the construction on the land bearing survey No. 113/2 cannot be accepted as admittedly, the Snehanjali society

has put up the construction on the land belonging to other persons and that too without any development permission and/or getting the plan sanctioned.

21. So far as the challenge to the Town Planning Scheme which has become final, in breach of Section 52 read with Rule 26 and Section 46 read with Rule 23 is concerned, it is required to be noted that as held by the Division Bench of this court in the case of **Chandravadan Chunilal Shah and others V. State of Gujarat and others** reported in 2002(3) GLH 76, no individual notices are required to be served as contended on behalf of the petitioner society. Petitioner has never submitted any objection. It is required to be noted that in the present case even the draft Town Planning Scheme came to be sanctioned in the year 1978 and at that time, even the Snehanjali society was not born, therefore, there was no question of giving them any opportunity and/or

issuing any notice. So far as the contention with regard to the breach of Section 46 read with Rule 23 of the Act and Rules is concerned, it is applicable only when the dispute is with regard to the ownership. In the present case, there is no dispute with regard to the ownership under the Town Planning Scheme and therefore, the said submission has no substance.

22. So far as the challenge to the variation of the scheme by notification dated 23-4-2001 is concerned, it is the contention on behalf of the petitioner that the proposed variation was not published in the Gujarati newspaper and the procedure as required under Section 70 of the Act has not been followed. At the outset, it is required to be noted that the variation is for correcting the error and that too qua correction of original survey Nos.113/1 and 113/2, the allotment of final plots qua respective owners remain the same and there is a correction with

regard to the survey numbers only and instead of survey No.113/1, survey No.113/2 is mentioned and instead of survey No.113/2, survey No.113/1 is mentioned. Otherwise, earlier also, Dahyaji Motiji & Others were allotted F.P. No.68 and after variation also, they are allotted F.P. No.68. It is also required to be noted that there is no variation with regard to F.P.No. 65 upon which there is illegal and unauthorized construction put up by the petitioner Snehanjali society. Therefore, it is not understandable how by variation, the petitioner is affected. Whatever, the rights are available to the petitioner against the original owners of land bearing survey No. 113/2, the same will be continued and when in lieu of survey No.113/2, the original owners are allotted F.P.No. 68 admeasuring 4299 sq mtr under the variation, then on establishment of his title, the same can be allotted to the Snehanjali society. That is not the dispute in this petition. Even, otherwise, as

stated above, the State Government considered the scheme to be defective on account of an error by mentioning survey Nos.113/1 and 113/2 by mistake and the State Government was satisfied that the variation required in the said scheme is not substantial and therefore, the proposed draft variation was published in the Government of Gujarat dated 2-6-2000 and as mentioned in the notification dated 23-4-2001, the Government was satisfied that necessary action for getting and affixing copies of the said notification has been duly taken by the AUDA and as no objection to the draft variation, have been received by the State Government, the variation is sanctioned. Considering the above, it cannot be said that the procedure as required under Section 70 of the Act has not been followed. Thus, challenge to the variation also fails.

23. Now, so far as the decisions relied upon by the learned advocate appearing on behalf of the

Snehanjali society i.e. Jaswantsingh Mathurasingh (supra) and Mansukhlal Jadavji Darji (supra) are concerned, it is required to be noted that the Hon'ble Supreme Court in the aforesaid two decisions has held that tenants, who were in occupation of the premises at the time of declaration of intention were required to be served with the notices. In the present case, as stated above, even till the draft scheme was sanctioned, Snehanjali society was even not born, meaning thereby they have even not purchased the lands in question. Therefore, there is no question of serving any notice upon the Snehanjali society. Even, otherwise, as stated above, the Division Bench of this court relying upon the provisions of the Gujarat Town Planning Act, has specifically held that no special notices are required to be served and/or by not issuing special notice, the scheme will not be vitiated.

So far as the decision relied upon in the

case of Kaushikprasad Chandulal Mahadevia (supra) is concerned, the said decision will not be of any assistance to the petitioner Snehanjali society because in that case, the variation was found to be substantive. In the present case, the variation is not substantive and it has been found to be due to error and only respective survey numbers are changed. However, respective owners are allotted same final plots, which were allotted earlier. Therefore, the variation cannot be said to be substantive.

24. At this stage, various litigations/ proceedings before different Courts are also required to be referred to. As stated above, on service of the notice dated 6-2-90 by the AUDA directing the Snehanjali society to remove the illegal and unauthorized construction on the land bearing survey No. 113/2, Snehanjali society has filed Regular Civil Suit No.139 of 1990 and obtained injunction. It is required to be noted

that the said suit is only for a permanent injunction. Though the ex parte ad interim relief was granted in the year 1990, Exh-5 application was not decided and/or no steps were taken by the AUDA for vacating and/or modification of the interim order passed in Civil Suit No.139 of 1990 and therefore, a direction was issued by this court and thereafter, the AUDA submitted an application for vacating and/or modification of the interim order passed below Exh-5 passed in Civil Suit No.139 of 1990 and this court is informed that the learned trial Court has vacated the interim order passed below Exh-5 in Civil Suit No.139 of 1990. However, against which Snehanjali society has preferred appeal before the District Court and the same is pending.

One another suit being Regular Civil Suit No.544 of 1991 is filed by the Nidhi society in the court of learned Civil Judge (SD), Ahmedabad Rural against Snehanjali society as well as AUDA for an appropriate decree directing the

Snehanjali society to remove illegal and unauthorized construction which is there on the land bearing original survey No.113/2 (F.P.No. 65). One another suit being Regular Civil Suit No.545 of 2002 is filed in the court of learned Civil Judge (SD), Ahmedabad Rural by the Snehanjali society against the original land owners of land bearing survey No. 113/2, Nidhi society etc. for a declaration that the Snehanjali society is the owner, in occupation and possession of the original survey No.113/2 and the construction put up on the said land and that the defendants have no right, title and/or interest in the land bearing survey No. 113/2. It appears that the Snehanjali society has also submitted an application below Exh-5 in the said suit and the application below Exh-5 has been dismissed. It appears from the record that one another Regular Civil Suit No.336 of 2004 is also filed by the Snehanjali society for a declaration that the Snehanjali society has become the owner

of land bearing survey No. 113/2 (forming part of F.P.No. 65). It appears that one another suit is also filed establishing the title of the Snehanjali. Thus, various litigations are pending between the parties unnecessarily. However, the fact remains that the land bearing original survey No.113/2 is forming part of F.P.No. 65 under the finalized Town Planning Scheme and the same is allotted to the owners of the land bearing survey Nos. 110/1 and 110/2 in lieu of their land. Under the provisions of the Act, on sanctioning of the Town Planning Scheme, the land absolutely vests in the Town Planning Authority and thereafter original owner looses all his rights and parties are to be governed as per the re-distribution of plots i.e. on the basis of the allotment under the Town Planning Scheme. Thus, the owners of original survey Nos.110/1 and 110/2 i.e. now the petitioner of Special Civil Application No.12749 of 2003 i.e. Nidhi society have become the absolute owner of the land

bearing F.P.No. 65 (even original survey No.113/2). Therefore, and considering the above, more particularly, when the Snehanjali society has put up the construction illegally and unauthorizedly on the land bearing survey No. 113/2, which belongs to the owner of F.P.No. 65 and that too when the construction is illegal and unauthorized, the prayer of the petitioner Snehanjali society to restrain the AUDA from demolishing and/or removing the construction on the land bearing survey No. 113/2 (now forming part of F.P.No. 65) cannot be granted. Granting of special relief would not be in consonance with the provisions of the Town Planning Scheme and the sanctioned scheme and granting of such relief would amount to directing the AUDA not to implement the Town Planning Scheme, which has become final. Under the circumstances, there is no substance in Special Civil Application No.1931 of 2005 and the same is required to be dismissed.

25. Now so far as Special Civil Application No.12749 of 2003 is concerned, under the finalized Town Planning Scheme, they are allotted F.P.No. 65 and original survey No.113/2 is forming part of F.P.No. 65, which is allotted to the petitioner. Once, a Town Planning Scheme has become final, it is the bounden duty of the authority under the Town Planning Act to implement the Town Planning Scheme fully and the owners are required to be handed over the peaceful and vacant possession of the land which is allotted to them under the finalized Town Planning Scheme. For the purpose of implementing the Town Planning Scheme, if anybody has put up construction illegally and unauthorizedly on the land which is allotted to some other persons and the same is to be demolished and/or removed for effective implementation of the Town Planning Scheme then the consequences must follow. At this stage, the judgment of the Hon'ble Supreme Court in the case of **The Municipal Corporation for**

Greater Bombay and another V. The Advance Builders (India) Pvt. Ltd. and others reported in AIR 1972 SC 793 as well as recent decision of the Hon'ble Supreme Court in the case of **N. Nanalal Kiklawala and another V. State of Gujarat and others** reported in AIR 2006 SC 1 are required to be referred to. It is held by the Hon'ble Supreme Court in the case of the Municipal Corporation for Greater Bombay and another (supra) that it is the duty of the appropriate authority to implement the Town Planning Scheme. In a decision of N. Nanalal Kiklawala and others(supra), the Hon'ble Supreme Court considering the aforesaid decision, has directed to implement sanctioned Town Planning Scheme by holding that statutory consequences, which flow from sanctioning of the scheme would flow. In view of the above, for the purpose of implementation of the Town Planning Scheme, which has become final and for the purpose of handing over the peaceful and vacant possession of entire F.P.No. 65 i.e. original

survey No.113/2, which is now forming part of F.P.No. 65 is to be handed over to the petitioner and for that if any construction is to be removed then that consequences must follow. Under the circumstances, Special Civil Application No.12749 of 2003 is required to be allowed and the AUDA is to be directed to implement the Town Planning Scheme and to hand over the peaceful and vacant possession of entire F.P.No. 65 to Town Planning Scheme, Thaltej No.1 (final).

26. For the reasons as stated above, Special Civil Application No.1931 of 2005 fails and the said is required to be dismissed and is accordingly dismissed. Rule is discharged. Ad interim relief granted earlier, if any stands vacated forthwith. However, there shall be no order as to costs.

So far as Special Civil Application No.12749 of 2003 is concerned, it is allowed. Respondent AUDA is directed to implement the Town Planning

Scheme, Thaltej No.1 (final) by handing over the peaceful and vacant possession of entire F.P.No. 65 (inclusive of original survey No.113/2) to the petitioner of said Special Civil Application and the said exercise be done within a period of four months from the date of receipt of this order. Rule is made absolute to the aforesaid extent. However, there will be no order as to costs.

(M.R.SHAH,J.)

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